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[1] Compiled by Matthew Klein. Please note that the summaries are for the benefit of the reader for his/her personal use.

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Standard Bank of South Africa Limited v Marais (884/21) [2022] ZAGPPHC 134 (14 March 2022)

Sequestration application- respondent contends that he is not insolvent and he tenders to pay the applicant the amount owed to it by 31 May 2022- rule *nisi* is discharged conditionally

[1] The applicant seeks the final sequestration of the respondent pursuant to a provisional sequestration order having been granted on 8 December 2021. The respondent opposes the application. He contends that he is not insolvent and he tenders to pay the applicant the amount owed to it by 31 May 2022.

[2] The provisional sequestration order was granted by Matshitse AJ on 3 December 2021 after having heard both parties. Matshitse AJ found that the applicant established a *prima facie* case and satisfied the requirements in terms of the Insolvency Act, 24 of 1936 (Insolvency Act), to be granted a provisional sequestration order against the respondent.

[3] Matshitse AJ held with reference to *DP Du Plessis Prokureurs v Van Aarde**[1]* that the estate of a debtor who has committed an act of insolvency may be sequestrated even if his estate is technically solvent. He reiterated that the court may also have regard to 'undisputed and unexplained indication of a debtor's inability to pay his debts, or failure to make an open an[d] honest disclosure of his position in this regard.'

[4] Bertelsman *et al,* explain with reference to **section 12** of the **Insolvency Act and** applicable caselaw in Mars: The Law of Insolvency in South Africa,**[2]** that a court may grant an order for the final sequestration of the estate at the hearing on the return date of the *rule nisi*, if the court is satisfied that-

a) the sequestrating creditor has established against the debtor a claim entitling him to apply for the sequestration of the debtor's estate; and

b) either the debtor has committed an act of insolvency or the debtor is insolvent; and

c) there is reason to believe that it will be to the advantage of creditors if the debtor's estate be sequestrated

but that it is not bound to do so. Even where the court is satisfied that a proper case has been made out, it still has a discretion either to grant or refuse a final sequestration order.**[3]**

[5] It was held in *Amod v Khan* that:**[4]**

> 'where the debtor opposes the final order and there is evidence on both sides before the Court, that the case has to be decided on the balance of probabilities'

[6] It is common cause that the respondent is a judgment debtor of the applicant. The applicant issued summons against the respondent and applied for summary judgment. An agreement between the parties wherein the respondent acknowledged his indebtedness to the plaintiff in respect of the claims contained in the summons was made an order of court. The agreement contained a payment schedule. The parties further agreed that in the event of any default by the respondent, the full amount owning would become due and payable and that the applicant may then attach the immovable properties described in the summons and issue writs of execution in respect of the immovable properties. The judgment debt remained unsatisfied and the respondent is still indebted to the applicant in the amount of R9 354 620.78 together with interest thereon at the rate of 10.6% p.a. calculated daily and compounded monthly in arrear from 31 October 2020 to date of payment.

[7] The applicant holds security for the indebtedness of the respondent in the form of First and Second Continuing Covering Mortgage Bonds for the amounts of R8 000 000.00 and R7 600 000.00 respectively on the immovable farm properties described in the founding affidavit. The applicant obtained a sworn valuation of the immovable properties in 2018. On the date of valuation, the market value of the properties was R29 700 000.00 and the forced sale value of the properties was R21 000 000.00.

Counsel for the applicant referred me to *Estate Logie v Priest****[16]*** as authority for the contention that it is not improper for a creditor to sequestrate his debtor's estate with the object of obtaining payment of his debt. This position is in line with Didcott J's view that sequestration has been described as a legitimate form of execution. However, after considering the facts before me, I cannot find that the creditors cannot get payment except through sequestration. The Constitutional Court's decision did not alter the position as related by Didcott J - that although sequestration is a legitimate form of execution a judgment creditor does not have the same automatic right to it which ordinarily governs execution of the routine kind.

[29] The applicant is a secured creditor. It cannot be disputed that the respondent gave the applicant the run-around and that his evasive and obstructive conduct precipitated this sequestration application, but the applicant is factually solvent. He is in the process of obtaining bridging finance and of selling his immovable farming properties. He stated unequivocally that he consents to the applicant approaching this court for a final sequestration order

if the applicant's claim has not been settled in full by 31 May 2022. I am of the view that a failure to sell the farm properties, or obtain bridging finance to settle the applicant's claim in full by 31 May 2022 will constitute conclusive proof that it is to the creditor's advantage that a trustee step in to realise the assets.

[30] I considered extending the provisional order. The provisional trustees are, however, not empowered to sell any of the respondent's property without being duly authorised by the court. The extension of the provisional order will thus not serve any purpose.

[31] In the circumstances I cannot find that the applicant made out a case that it would be to the advantage of creditors to grant a final sequestration order at this stage. The respondent's preceding conduct, however, informs the order, and the costs order that I am granting and justifies a departure from the general rule that costs follow suit.

ORDER

In the result the following order is granted:

1. The rule *nisi* is discharged;

2. The applicant may approach Van der Schyff J or any other judge appointed by the Deputy Judge President on notice to the respondent, on the same papers, duly supplemented, for a final sequestration order if its claim has not been settled in full by 31 May 2022;

3. Such notice may be delivered at the office of the respondent's current attorneys of record;

4. In the event that the respondent's current attorneys of record's mandate is terminated the notice may be delivered by emailing it to the respondent's last known email address;

5. The respondent is to pay the costs of this application on an attorney and client scale.

MBT Petroleum (Pty) Ltd v Shalom Afslaers CC [2022] ZANWHC 11 (25 March 2022)

Winding-up (liquidation) proceedings ought not be resorted to as a means in order to enforce the payment of a debt, the existence of which is bona fide disputed on reasonable grounds.

[1] On 16th November 2016 the applicant and the respondent, both duly represented, entered into a written retail and supply agreement for a period of ten (10) years, in terms where the applicant would supply petroleum (fuel) and associated products to

the respondent, who in turn operate as an MBT Petroleum Dealership retailer. Goods were supplied and delivered and the respondent was invoiced for same. An amendment was effected to this agreement by a so-called solar agreement that was entered into. A solar system were to be installed but instead till points were installed on the premises of the respondent and the applicant would in turn not pay for the installation of the solar system. In addition there was also an agreement entered into with regard to the Buzz Café. The applicant allege that the respondent is in breach of the agreements by, *inter alia*, failing to pay the amounts due to the applicant in terms of the retail and supply agreement on due dates ; willfully discontinued the sale of petroleum products of the applicant; and purchasing and selling fuel and products other than that of the applicant. An amount of R2 638 556.97 is allege to be due in respect of the retail and supply agreement and R393 591.47 in respect of the Buzz Café. Due to the allege breach, these agreements were cancelled on 01st September 2021. Over and above the aforementioned claims, the applicant also allege that it suffered damages as a result of the breach and subsequent cancellation of the agreements in the amount of R22 915 680.85.

[2] Demand for payment in respect of the aforementioned amounts were made in terms of section 66 and 69 (1) (A) of the Close Corporation Act 69 of 1984, read with the provisions of Item 9 of Schedule 5 of the **Companies Act 71 of 2008**. Demand notwithstanding, the respondent failed to pay the aforesaid amounts. This prompted the applicant to lodge an application praying that the respondent be placed under final liquidation **alternatively** provisional liquidation in the hands of the Master of the High Court. This liquidation (provisional or final) is opposed by the respondent. The respondent state that it is disputing the amounts claimed on genuine and bona fide grounds. Since April 2017 it was incorrectly invoiced and an incorrect pricing structure was used. So for the past four (4) years it was over-charged because of a fundamentally flawed interpretation of the retail and supply agreement. Significant amounts have been paid as a result of the incorrect pricing system and it requested a statement and debatement of its account with vouchers and supporting indebtedness to each other. This request by the respondent was refused.

[3] The respondent tendered unconditional payment of an amount which may be found to be due and owing to the applicant, if any. An amount equivalent to the amount claimed to be due (R2 638 556.97 and R393 591.47) was paid into the trust account of the respondents' attorney. This was conveyed to the applicants' attorney of record. This despite, the present liquidation application was lodged.

[4] Winding-up (liquidation) proceedings ought not be resorted to as a means in order to enforce the payment of a debt, the existence of which is bona fide disputed on reasonable grounds. The winding-up procedure is therefore not designed for the resolution of disputes regarding the existence or non-existence of a debt.

[5] In **Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346** (T) the following is stated: …..

> This is referred to as the ‘Badenhorst rule’ which is the label used to describe the principle that winding-up is not an appropriate procedure to be available of by a creditor whose claim against the respondent company is bona fide disputed on reasonable grounds.

[6] It is contended by the applicant that the respondent’s contention that the disputes raised by it relates to the existence of the debt, is factually incorrect. There is at least a portion of the debt of R2.6 million disputed. This being the case, the respondent concedes that it is indebted to the applicant an amount in excess of R200.00 as required in terms of the act. The respondent, despite demand, failed to secure or to pay the said amounts within twenty-one (21) days of demand. Therefore, it is deemed that the respondent is insolvent in terms of **section 69** (1) (A) of the act.

Consequently, the following order is made: (i) The application for liquidation (provisional or final) of the respondent is dismissed.(ii) The applicant is ordered to pay the costs of this application on the scale as between attorney and client.(iii) Such costs to include the costs consequent upon the employ of two counsel, senior and junior.

Ngcongo and Another v Voltex (Pty) Ltd In re: Voltex (Pty) Limited v IEC Contractors CC and Another (9813/2021) [2022] ZAGPJHC 122 (7 March 2022)

Rescission application- of the winding up order before this court-on facts refused

[1] The first and second applicants for rescission, Mr Ngcongo and IEC seek to rescind a final liquidation order obtained by the respondent, Voltex by default. Voltex contends that there is an amount of in excess of R 3.8 million owing to it by IEC on account for goods sold and delivered. The defence raised by applicants is one of payment of all sums claimed.

Procedural Background

[2] On 3 June 2021, Voltex obtained the final winding up order of IEC on the basis that IEC is unable to pay its debts, in terms of section 69(1)(a) and 69(1)(c)of the Close Corporations Act (the Act).[1]

[3] On 14 June 2021, IEC Mr Ngcongo, as its sole registered member, launched an application in two parts. Under part A an urgent stay of execution of the winding up order was sought. This order was granted urgently on 25 June 2021 subject to arrangements regarding the filing of papers and the expeditious adjudication of the. The application is brought under the common law.

[4] Voltex opposes the application. It argues that the applicants have failed to establish any of the essential elements entailed in showing the necessary good

cause for rescission: explanation for the default, that the application is bona fide, that IEC has a bona fide defence which prima facie carries some prospect of success.[2] This latter element entails IEC showing, prima facie, that it is factually and commercially solvent.

[5] I move to deal with the background to the liquidation with specific reference to IEC's treatment of each of these requirements for showing good cause for the rescission.

Historical Background

[6] The parties have traded with each other in a business relationship which has spanned more than 17 years. Voltex has supplied IEC with electrical components and related goods. The relationship has operated on the basis that the goods are ordered on credit in accordance with overarching credit agreements which have been renewed over the years. The last renewal was in 2019.

Conclusion

[48] IEC has not made out a case which goes any way to showing that payment has been made in millions of rands for the relevant period such that these payments have extinguished the indebtedness which was admitted in writing during late 2020.

[49] The rudimentary 'trial balances' which are attached to the founding affidavit in a purported attempt to show solvency emerge as no more than an attempt at obfuscation.

Order

[50] In the circumstances I make the following order:

The application for rescission is dismissed with costs which includes the costs of Part A of the application.

Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited (219/2021) [2022] ZASCA 24 (9 March 2022)

Companies Act- Section 165 of the **Companies Act, which**-Derivative actions-rule 35(12) – production of documents mentioned in or referred to in the other party's affidavit – obligation on such party to produce documents sought by opponent – no obligation to produce documents sought if such documents irrelevant or not material

or protected by privilege or no longer in the possession of the party required to produce the documents concerned.

[1] The **Companies Act[** permits a certain category of persons to serve a demand on a company requiring the company concerned to commence or continue legal proceedings, or take related steps, to protect the interests of the company in question.**[3]** In the context of the facts of this case the appellant, Caxton and CTP Publishers and Printers Limited (Caxton) falls within the class of persons contemplated in **s 165(2)** of the **Companies Act who** may serve a demand upon a company, namely, the respondent, Novus Holdings Ltd (Novus), to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company concerned. If the company upon which a demand has been served refuses to initiate or continue legal proceedings, the person who made the demand in terms of **s 165(2)** may apply to court for leave to bring or continue legal proceedings in the name and on behalf of the company concerned. This is precisely what happened in this case.

The parties

[2] Novus is a public company listed on the Johannesburg Securities Exchange. Novus' core business entails the publication and printing of books, magazines, newspapers and related activities. It is the respondent both in the main application, which is still pending, and in the interlocutory application, related to the main application, the latter application being at the centre of this appeal.

[3] Caxton is likewise a public company and, like Novus, is one of the largest publishers and printers in the country of books, magazines, newspapers and related activities. It is also listed on the Johannesburg Securities Exchange. Caxton and Novus are commercial competitors. Caxton is a minority shareholder in Novus, holding 7,5 per cent of the latter's shares.

Background

[4] The facts upon which this appeal hinges are fairly straightforward and may be summarised as follows. On 7 April 2020, and pursuant to **s 165(2)** of the **Companies Act, Caxton** served a demand upon Novus to institute legal proceedings against Lebone Litho Printers (Pty) Ltd (Lebone). According to Caxton, the envisaged legal proceedings would seek to have a commission agreement (and any related agreements) concluded between Novus and Lebone declared illegal and void. In terms of the impugned agreement, Novus undertook to pay commission to Lebone in relation to a public procurement contract between Novus, on the one hand, and the Department of Basic Education (DBE), on the other, for the printing, packaging and distribution of school workbooks throughout the country.

[5] **Section 165** of the **Companies Act, which** is headed 'Derivative actions', in relevant parts provides:

'(1) Any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right.

(2) A person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company if the person—

(a) is a shareholder or a person entitled to be registered as a shareholder, of the company or of a related company;

(b) is a director or prescribed officer of the company or of a related company;

(c) is a registered trade union that represents employees of the company, or another representative of employees of the company; or

(d) has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person.

(3) A company that has been served with a demand in terms of subsection (2) may apply within 15 business days to a court to set aside the demand only on the grounds that it is frivolous, vexatious or without merit.

(4) If a company does not make an application contemplated in subsection (3), or the court does not set aside the demand in terms of that subsection, the company must—

(a) appoint an independent and impartial person or committee to investigate the demand, and report to the board on—

(i) any facts or circumstances—

(aa) that may give rise to a cause of action contemplated in the demand; or

(bb) that may relate to any proceedings contemplated in the demand;

(ii) the probable costs that would be incurred if the company pursued any such cause of action or continued any such proceedings; and

(iii) whether it appears to be in the best interests of the company to pursue any such cause of action or continue any such proceedings; and

(b) within 60 business days after being served with the demand, or within a longer time as a court, on application by the company, may allow, either—

(i) initiate or continue legal proceedings, or take related legal steps to protect the legal interests of the company, as contemplated in the demand; or

(ii) serve a notice on the person who made the demand, refusing to comply with it.

(5) A person who has made a demand in terms of subsection (2) may apply to a court for leave to bring or continue proceedings in the name and on behalf of the company, and the court may grant leave only if—

(a) the company—

(i) has failed to take any particular step required by subsection (4);

(ii) appointed an investigator or committee who was not independent and impartial;

(iii) accepted a report that was inadequate in its preparation, or was irrational or unreasonable in its conclusions or recommendations;

(iv) acted in a manner that was inconsistent with the reasonable report of an independent, impartial investigator or committee; or

(v) has served a notice refusing to comply with the demand, as contemplated in subsection (4)*(b)*(ii); and

(b) the court is satisfied that—

(i) the applicant is acting in good faith;

(ii) the proposed or continuing proceedings involve the trial of a serious question of material consequence to the company; and

(iii) it is in the best interests of the company that the applicant be granted leave to commence the proposed proceedings or continue the proceedings, as the case may be.

. . .

(7) A rebuttable presumption that granting leave is not in the best interests of the company arises if it is established that—

(a) the proposed or continuing proceedings are by—

(i) the company against a third party; or

(ii) a third party against the company;

(b) the company has decided—

(i) not to bring the proceedings;

(ii) not to defend the proceedings; or

(iii) to discontinue, settle or compromise the proceedings; and

(c) all of the directors who participated in that decision—

(i) acted in good faith for a proper purpose;

(ii) did not have a personal financial interest in the decision, and were not related to a person who had a personal financial interest in the decision;

(iii) informed themselves about the subject matter of the decision to the extent they reasonably believed to be appropriate; and

(iv) reasonably believed that the decision was in the best interests of the company.

(8) For the purposes of subsection (7)—

(a) a person is a third party if the company and that person are not related or interrelated; and

(b) proceedings by or against the company include any appeal from a decision made in proceedings by or against the company.

. . .

(14) If the shareholders of a company have ratified or approved any particular conduct of the company—

(a) the ratification or approval—

(i) does not prevent a person from making a demand, applying for leave, or bringing or intervening in proceedings with leave under this section; and

(ii) does not prejudice the outcome of any application for leave, or proceedings brought or intervened in with leave under this section; or

(b) the court may take that ratification or approval into account in making any judgment or order.

(15) Proceedings brought or intervened in with leave under this section must not be discontinued, compromised or settled without the leave of the court.

(16) For greater certainty, the right of a person in terms of this section to serve a demand on a company, or apply to a court for leave, may be exercised by that person directly, or by the Commission or Panel, or another person on behalf of that first person, in the manner permitted by **section 157.'**

[6] Invoking **s 165(4)**, Novus appointed retired Deputy President of the Supreme Court of Appeal, Justice Louis Harms, as an independent and impartial person (the independent and impartial person) to investigate the demand, and thereafter to report to its board of directors on the matters set out in **s 165(4).[5]** Upon receipt of the independent and impartial person's report, Novus advised Caxton that the latter's demand to institute legal proceedings against Lebone was declined. Undaunted, Caxton instituted the main application**[6]** against Novus, in which leave is sought to bring the envisaged action in the latter's name and on its behalf.

[7] Unsurprisingly, Novus has steadfastly resisted the relief sought by Caxton in the main application. In its answering affidavit in the main application, Novus makes reference to several documents, one of which is the **s 165(4)** report, in terms of which it sought to demonstrate that the proposed action lacked any prospect of success or was simply devoid of merit.

DERBY DOWNS MANAGEMENT ASSOCIATION v ASSEGAAI RIVER PROPERTIES (PTY) LTD AND ANOTHER 2022 (2) SA 71 (KZP)

Company — Memorandum of incorporation — Resolution to amend — Validity — Ratification of director's misconduct — Companies Act 71 of 2008, s 20(2).

In 2007 Derby Downs Management Association (Derby), an office-park management company, passed a special resolution to alter its articles of association so as to allow for levies owing by property owners to be calculated on a different basis than before. In litigation relating to the implementation of this resolution — between Derby and an owner of property in the office park, Assegaai River Properties (Pty) Ltd (Assegaai) — the High Court had held that the 2007 special resolution had lapsed and was void because it was not registered as required by s 202 of the Companies Act, 1973. In response Derby passed two special resolutions in 2017: the first sought to ratify the

2007 special resolution; the second that levies so calculated and charged 'be and are hereby approved and ratified'.
Assegaai, arguing that the 2017 resolutions did not have the effect of regularising the levy-distribution system adopted in the 2007 resolution, subsequently applied under the Community Schemes Ombud Service Act 9 of 2011 for an order that the levies which had been raised between 2007 and 2017 be adjusted to reflect an apportionment on the pre-2007 resolution basis. The adjudicator (the second respondent here) dismissed Assegaai's application, holding that under s 20(2) of the Companies Act 71 of 2008 shareholders could ratify what had been wrongly done, and that they had done so. Assegaai next successfully appealed the adjudicator's ruling, the High Court holding that the 2007 resolution could not be ratified since it had been declared void by the court.
This case concerned Derby's appeal to the full court. At issue was the validity of two 2017 special resolutions.
Held
Resolution No 1 had two components. One was an express act of amendment; the other implied — that, despite the fact that the amendment was only effected in 2017, it operated retroactively from 2007. This implied component was plainly in conflict with s 16(9) of the Act — that an amendment of a company's memorandum of incorporation takes effect 'on the later of the date on, and time at, which the notice of amendment is filed, or the date, if any, set out in the notice of amendment'. Special resolution No 1 of 2017 therefore did not validly bring about changes to the company's memorandum of incorporation during the period 2007 – 2017. (See [31] and [32].)
As to special resolution No 2: The provisions of the appellant's original articles of association limited and restricted the power of the appellant to the regime based on land area when raising levies against its members. As a consequence, the directors had no authority to authorise the appellant to do otherwise. There was accordingly 'misconduct' of the type contemplated by s 20(2) of the Act between 2007 and 2017, which according to the plain wording of that section the members could ratify, as they did, by special resolution. Accordingly, the appeal against the adjudicator's decision ought not to have been upheld by the court a quo, and the appeal against its decision would be upheld. (See [41], [43] and [44].)

MOODLIAR NO AND OTHERS v LAWSON TOOL DISTRIBUTORS (PTY) LTD 2022 (2) SA 220 (WCC)

Impeachable transactions— Unlawful alienations and preferences — Voidable disposition — Preferring one creditor over others — What preferred creditor must show to stave off voidance — Distinction between intent to prefer, and underlying reasons or motive, not useful — Series of purchases from creditor to enable insolvent to carry on trading — Not made with intention to prefer — Not constituting voidable dispositions — Insolvency Act 24 of 1936, s 29(1).

Winding-up — Unlawful alienations and preferences — Voidable disposition — Preferring one creditor over others — What preferred creditor must show to stave off voidance — Distinction between intent to prefer, and underlying reasons or motive, not useful — Series of purchases from creditor to enable insolvent to carry on trading — Not made with intention to prefer — Not constituting voidable dispositions — Insolvency Act 24 of 1936, s 29(1).

Section 29(1) of the Insolvency Act 24 of 1936 allows the court to set aside a disposition made by an insolvent within six months of sequestration if it preferred one creditor over another. It also provides the beneficiary with a defence if it can show that the disposition was made (i) in the ordinary course of business; and (ii) without an intention to prefer one creditor over another.

The facts were that the plaintiffs, the liquidators of construction company V Co, invoked s 29 to claim back R1,3 million V Co had paid the defendant, a supplier of construction materials, in the six months before V Co's liquidation. They were regular arm's-length payments on account over a four-month period, the last of which was made some two months prior to V Co's liquidation. The plaintiffs claimed that they were voidable dispositions under s 29 because they preferred the defendant over V Co's other creditors. The defendant admitted as much but pleaded that the payments were made in the ordinary course of V Co's business and were not intended to prefer one creditor above another. This was contested by the plaintiffs, who argued that the making of regular payments to the defendant while V Co's other creditors remained unpaid could not have been payments made in the ordinary course of business.

In the absence of evidence of any reason save commercial survival why V Co would favour the defendant over its other creditors, the plaintiffs sought to rely on the distinction between purpose or motive (to obtain supplies) and intention (to prefer defendant) in *Gore and Others NNO v Shell South Africa (Pty) Ltd* 2004 (2) SA 521 (C) ([2003] 4 All SA 370).

Held

The 'ordinary course' enquiry should focus on whether, in the context of the business relationship between V Co and the defendant, the dispositions would appear anomalous or unbusinesslike to the ordinary person of business. V Co purchased supplies (which it presumably required to carry on its own business as a major builder) from the defendant and duly paid for them on a regular basis within the stipulated period. In these circumstances there was no basis for any finding that such dispositions were made other than in the ordinary course of business. Accordingly, the defendant discharged the onus of proving the first element of its defence to the claim. (See [21] – [22].)

As to the second element of the defence (intent), the nature of the parties' respective businesses was an important consideration. V Co needed construction materials to trade its way out of the difficulties in which it found itself, and a belief that it could do so could negate an inference of intention to prefer a particular creditor. (See [26] – [28].)

Distinguishing between reason and intent was of limited value and potentially misleading. Correctly viewed, the act that was accompanied by an intent or intention in the strict sense was that of making the disposition. This act was accompanied or impelled by reasons, motive or intent, and where this was predominantly to favour a particular creditor over another, such a disposition was voidable. In a civil-law context distinctions between motive, intent and underlying reasons were not always clear and risked undermining the settled test of seeking the dominant, operative or effectual intention and of concentrating unduly on the effect of the payment vis-à-vis other creditors rather than the subjective intention of the payer. (See [32] – [35].)

It would in the present circumstances be strained to relegate to a secondary role what appeared on the probabilities to have been V Co's primary concern, to continue trading as a builder, and to view its dominant intent as being to favour a supplier with whom it had an entirely regular customer/supplier relationship going back years. The most plausible inference from the evidence was that V Co's dominant intention for

making the impugned dispositions was not to prefer the defendant over other creditors, but simply to obtain building supplies to keep its business afloat and with some prospect of surviving its financial activities. (See [36].) Claim accordingly dismissed (see [37] – [38]).

ABSA Bank Limited v Go On Supermarket (Pty) Limited (The Spar Group Limited intervening) (9442/2022) [2022] ZAGPJHC 173 (24 March 2022)

General notarial bond over movable property – Perfecting of – Effect of debtor placed under business rescue – Business Rescue Practitioner consenting to the perfection of general notarial bond over movables – creditor obtains possession by leaving debtor in control and possession – pledge perfected – symbolic transfer of possession sufficient to constitute a pledge – real right established – application granted to limited extent.

(1) The intervening party is granted leave to intervene in this urgent application.

(2) The applicant's non-compliance with the rules of this Court in respect of time periods and service of processes, is condoned and compliance with such rules are dispensed with and this application is enrolled as an urgent application in terms of Uniform Court Rule 6(12).

(3) Subject to the Spar Group Limited's pledge and real right of possession over all the assets and equipment as contained in annexure A to the Special Notarial Bond BN9369/2018 held by and in favour of the Spar Group Limited, the applicant is authorised to perfect its security of pledge under General Covering Notarial Bond BN16/43750, limited to the amount of R6 000 000, in respect of those assets of the respondent that are not the subject of the Spar Group's Special Notarial Bond BN9369/2018, situated at the respondent's premises at shop 12 and 13, Lyndhurst Superspar, Lyndhurst Square Shopping Centre, corner Drome and Pretoria Road, Lyndhurst, Gauteng, 2192 or wherever else situated.

(4) The Sheriff of the High Court is authorised to attach and take a written inventory of and value so much of such moveables and stock-in-trade situated at the premises, limited to the value of R6 000 000 ('the attached assets') and thereafter hand such written inventory to the applicant's attorneys and the Business Rescue Practitioner.

(5) This order of perfection in respect of the movables and stock-in-trade shall vest with the applicant a continuing real right of attachment over such attached assets, subject to the conditions that:

5.1 The applicant itself shall not take physical possession or remove such attached assets;

5.2 The Business Rescue Practitioner is allowed to use the attached assets in its day-to-day trading activities of the respondent, while in business rescue.

(6) Notwithstanding that provided for in paragraph 4 above, the Business Rescue Practitioner is nominated as and will at all times act as the applicant's agent for the purposes of the applicant exercising control and physical possession of and over the attached assets.

(7) The applicant may not, without the leave of the Court or with the written consent of the Business Rescue Practitioner, sell, alienate and/or dispose of the attached assets.

I find myself in agreement with the Spar Group's submissions in that regard. The point is that the Spar Group has rights in and to the respondent's movable property, which stand to be adversely affected by the Order sought in this application. These rights are derived by virtue of the Special Notarial Bond registered in favour of the Spar Group over certain identified movable assets of the respondent and the contractual reservation of ownership in its favour in respect of all goods sold and delivered to the respondent for as long as the respondent continues to hold the oods in stock.

[12]. Moreover, in terms of **section 145(1)(b)** of the **Companies Act, each** creditor is entitled to participate in any court proceedings arising during business rescue proceedings. For all of these reasons, I am of the view that the Spar Group has made out a case for leave to intervene in this urgent application. I therefore intend granting an order to that effect.

[13]. As for their opposition to the application itself, the Spar Group alleges that, as a wholesaler, it supplies groceries and other household goods to the respondent which carries on a retail supermarket business under the Spar brand name. In the course of this trading relationship, the respondent was granted credit facilities subject to the operation of their standard terms of sale and the obtaining of securities for the credit facilities, in particular the registration of notarial bonds over the movable property of the respondent. As already indicated, the respondent's indebtedness to the Spar Group at present amounts to a sum in excess of R17 000 000.

[14]. On the other hand, so the Spar Group contends, the respondent's indebtedness to Absa is insignificant if compared to the indebtedness to the Spar Group.

[15]. The Spar Group also contends that, because they and ABSA are competing creditors laying claim, in terms of their general notarial bonds, to the same movable property of the respondent, the BRP should not have afforded Absa the opportunity to launch its perfection application before the Spar Group was brought into the picture. Absa's application was launched on 8 March 2022 and the Spar Group was only informed thereof by the BRP on 10 March 2022.

[16]. The Spar Group also opposes Absa's application for a perfection order on the basis that it is not founded upon a breach by the respondent of the terms of the general notarial bond and the ABSA's entitlement to foreclose. Rather, so the Spar

Group contends, Absa seeks a perfection order based solely on the ostensible consent given in writing by the BRP.

[17]. There is, in my view, no merit in these contentions by the Spar Group. The respondent's indebtedness to Absa is secured by a notarial bond registered in favour of Absa over the movable property of the respondent. In terms of the notarial bond, Absa is entitled to 'foreclose' in the event *inter alia* of the respondent being placed under judicial management. Business rescue proceedings is, in my view, a form of judicial management. Absa is therefore entitled to foreclose in terms of the bond and the fact that the Spar Group has a claim of a personal nature against the respondent makes no difference to Absa's entitlement to proceed in terms of the bond.

[18]. As was held in *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others**[1]***, a perfection clause entitles the holder of the bond to take possession of the movables over which the bond has been registered. Such a clause amounts to an agreement to constitute a pledge and will be enforced at the instance of the bondholder, whereupon the creditor obtains a real right of security.

[19]. At para 6, Harms JA held as follows:

'Real rights are stronger than personal rights and in the case of conflicting real rights the principle *prior tempore potior iure* applies. The right in question, a pledge, is a real right, which is established by means of taking possession and not by means of an agreement to pledge. The bondholder who obtains possession first thereby establishes a real right. If I may be permitted some more Latin: *vigilantibus non dormientibus iura subveniunt*, meaning that the laws aid those who are vigilant and not those who sleep. (Both principles provide a safer guide to the correct answer than the Court below's "just and equitable" principle. The fact that it is "fortuitous" that the vigilant person perfects his rights first does not make the act either unjust or inequitable.) … ... … The fact that Chesterfin's bond contained a provision prohibiting Eurotile from pledging or hypothecating its movables without Chesterfin's consent also has no effect on Contract Forwarding's position unless the latter knows of it. In the absence of Contract Forwarding's knowledge, Eurotile's breach of its contract with Chesterfin does not affect the former's position.'

[20]. As per the ratio in *Contract Forwarding*, I am of the view that Absa is entitled and permitted to take possession of the pledged goods with a view to perfecting its bond.

[21]. Also at para 14, the court had the following to say:

'There is no rule that provides that symbolical transfer of possession (like the handing over of keys) is not sufficient to constitute a pledge. It is different

with *constitutum possessorium*, a method of delivery that presupposes that the goods remained under the physical control of the debtor. That simply did not happen in this case.'

[22]. On the basis of this authority, I reiterate that, in my view, the Spar Group's grounds of opposition to Absa's application are devoid of merit.

[23]. In the event that the above Honourable Court is amenable to grant a perfection order in favour of Absa, so the Spar Group contends, the Court should not grant Absa the relief claimed as formulated by them because such formulation is defective in that Absa cannot obtain a perfection order in respect of assets belonging to the respondent which are already the subject matter of the Spar Group's special notarial bond. There is merit in this contention by the Spar Group. However, during the hearing of arguments before me, Mr Marais, who appeared on behalf of Absa, conceded as much, but proposed that any order granted by me should take into account this fact. The suggestion by Mr Marais was that the assets which are the subject of the special notarial bond in favour of the Spar Group be expressly excluded from the perfection order. That, in my view, takes care of that ground of objection.

[24]. The Spar Group also contends that the Absa cannot obtain a perfection order in respect of the movable assets in the respondent's possession, in respect of which the Spar Group has contractually retained ownership. This consists of stock supplied by the Spar Group. Also, so the Spar Group submits, Absa cannot obtain a perfection order in respect of the balance of the respondent's trading stock as trading stock is a circulating asset and the pledge will be destroyed the moment the respondent disposes of the trading stock. The proposed court order, so the argument goes, cannot vest Absa with a continuing real right of attachment over such attached assets as this depends on continuous possession and control being exercised by or on behalf of ABSA. For the reasons mentioned above, these contentions stand to be rejected. The point is that Absa has the right to perfect its security in terms of the notarial bond.

Costs

[25]. The general rule in matters of costs is that the successful party should be given her or his costs, and this rule should not be departed from except where there are good grounds for doing so.

[26]. *In casu*, it is so that Absa has been substantially successful in its application. The BRP did however not oppose the application and he in fact gave notice of his intention to abide. Therefore, there cannot possibly be a costs order awarded against the respondent.

[27]. As for the costs as between Absa and the intervening party, as correctly pointed out by Mr Strydom, who appeared on behalf the Spar Group, they have a measure of success in that property in respect of which they enjoy security in terms of a special notarial bond is to be excluded from a perfection of the notarial bond in favour of Absa. I therefore believe that the correct costs order to be awarded is one in terms of which each party is to bear his own costs.

[28]. I therefore intend granting a costs order to that effect.

Order

[29]. Accordingly, I make the following order: -

(1) The intervening party is granted leave to intervene in this urgent application.

(2) The applicant's non-compliance with the rules of this Court in respect of time periods and service of processes, is condoned and compliance with such rules are dispensed with and this application is enrolled as an urgent application in terms of Uniform Court **Rule 6(12).**

(3) Subject to the Spar Group Limited's pledge and real right of possession over all the assets and equipment as contained in annexure A to the Special Notarial Bond BN9369/2018 held by and in favour of the Spar Group Limited, the applicant is authorised to perfect its security of pledge under General Covering Notarial Bond BN16/43750, limited to the amount of R6 000 000, in respect of those assets of the respondent that are not the subject of the Spar Group's Special Notarial Bond BN9369/2018, situated at the respondent's premises at shop 12 and 13, Lyndhurst Superspar, Lyndhurst Square Shopping Centre, corner Drome and Pretoria Road, Lyndhurst, Gauteng, 2192 or wherever else situated.

(4) The Sheriff of the High Court is authorised to attach and take a written inventory of and value so much of such moveables and stock-in-trade situated at the premises, limited to the value of R6 000 000 ('the attached assets') and thereafter hand such written inventory to the applicant's attorneys and the Business Rescue Practitioner.

(5) This order of perfection in respect of the movables and stock-in-trade shall vest with the applicant a continuing real right of attachment over such attached assets, subject to the conditions that:

5.3 The applicant itself shall not take physical possession or remove such attached assets;

5.4 The Business Rescue Practitioner is allowed to use the attached assets in its day-to-day trading activities of the respondent, while in business rescue.

(6) Notwithstanding that provided for in paragraph 4 above, the Business Rescue Practitioner is nominated as and will at all times act as the applicant's agent for the purposes of the applicant exercising control and physical possession of and over the attached assets.

(7) The applicant may not, without the leave of the Court or with the written consent of the Business Rescue Practitioner, sell, alienate and/or dispose of the attached assets.

(8) Each party shall bear his own costs.

Firm-o-Seal CC v Wynand Prinsloo & Van Eeden Inc Case 3731 / 2020 Mmpumalanga Division, Middelburg local seat

Business rescue-retrospective confirmation by BRP concerning acts of a director-Section 137(2) of the Act - director must continue to exercise the functions of director, subject to the authority of the practitioner- the Plaintiff did not have the approval of the Practitioner when issuing the summons against the Defendants. I also find the action by the directors of the Plaintiff in instructing Mr. Schutte to issue summons was void for not having been approved by the Practitioner and that their decision is incapable of being ratified ex post facto. For the reason that the court upholds the special plea on this special plea, the special pleas raised on prescription will not be considered as they have become moot and academic.

[1] This matter came before court on a trial roll. The Plaintiff issued summons in which four claims are set out against the Defendants. The Plaintiff, a former client of the Defendants claims repayments over alleged overreach at the hands of its legal representatives in respect of the first two claims. The remaining claims are damages it suffered as a result of professional negligence by the Defendants in the manner in which they executed their mandate as its legal representatives. Six special pleas were pleaded by the Defendant against all these claims. At the time of hearing, one of the special pleas was abandoned, leaving just five. Four of the special pleas relate to prescription whereas the fifth one questions the Plaintiff's locus standi to litigate in this case.

[2] At the onset, both parties agreed that the special pleas be decided separately from the facts of the case in terms of Rule 33(4) of the Uniform Rules, and requested the court to make that order. An order was consequently made by the court to that

effect. For that reason, I will elaborate no further on the nature and details of the claims. The trial focused therefore on the five special pleas.

[3] The Defendants accepted the onus to begin and proceeded to hand in a number of exhibits as evidence. All these were accepted with no contestation from the Plaintiff. Case for the Defendants was closed with no oral evidence. The Plaintiff also handed in a number of exhibits which were received without any contestation from the Defendants. Mr. DPA Schutte also gave evidence for the Plaintiff. Mr. Schutte is the Plaintiff's legal representative. His evidence was mainly to direct the court to various documents and exhibits which already formed part of the evidence before the court. Essentially, he gave evidence on various dates on which he interacted with the Defendants and his clients with a view to suggest that the Plaintiff could not have been aware of the existence of the debt prior to his unearthing of certain evidence or his communication with them about it. Case for the Plaintiff was closed with no further evidence.

Issues for determination.

[4] In respect of the four special pleas on prescription, the court is called upon to determine if the Plaintiff's claims have prescribed in terms of the Prescription Act no. 68 of 1969. This would include the question on when is it that the debt became due and payable and when is it that the Plaintiff or its directors became aware of the existence of the debt. As for the special plea challenging the Plaintiff's locus standi, the court is to determine if the decision to litigate by the Plaintiff was with the requisite approval of the Business Rescue Practitioner (the Practitioner) since it was under business rescue proceedings when the summons was issued. There is consensus that a determination in favour of the Defendants on the special plea challenging the Plaintiff's locus standi disposes of the claims as a whole. The special pleas on prescription would therefore only be considered in case of a court's finding in favour of the Plaintiff in respect of the special plea challenging its locus standi. For this reason, it is apposite to consider the special pleas in that order.

Plaintiff's Locus Standi.

[5] Following are the common cause facts leading to this special plea. Mr Deon Cornelius & Mrs. Susan Cornelius are the members and directors of the Plaintiff. On 05 June 2019, the Plaintiff was placed under business rescue and Mr. Mahier Tayob was appointed as the Practitioner. At the instructions of Plaintiff's directors, summons commencing this action was issued on 02 December 2020. The issuing of summons was not only unauthorised by the Practitioner; he also did not know about it. In an email from the Practitioner's legal representative Mr. Essop of Aphane Attorneys, dated 27 January 2021, the following was confirmed as the instructions from him:

a) He did not instruct or consent to the institution of the action.

b) He had no knowledge of the matter.

c) He had no discussion in respect of the matter with the members of Firm-O-Seal or their attorneys.

d) He was not informed of the possible asset to recover.

e) He did not wish to proceed with the action.

f) He has instructed his legal representative to forward a letter to the Plaintiff's attorneys instructing them to withdraw the action.1

[6] On 03 March 2021, the Practitioner signed a power of attorney in which he authorised the Plaintiff's attorneys to proceed with the action, "ratifying" any steps and/or actions already undertaken by the attorney in this matter. The argument before the court centred around the interpretation of a section in the Companies Act, no 71 of 2008 (the Act) that requires the Practitioner to approve a decision to litigate by a company or a close corporation placed under business rescue. Can a ratification of a decision taken without the knowledge of a Practitioner be regarded as an approval in terms of the Act? If so, can a Practitioner change his earlier decision to withdraw an action and substitute it with a decision to proceed with it.

The Law

[7] Section 137 of the Act provides,

"137. Effect on shareholders and directors

(1) During business rescue proceedings an alteration in the classification or status of any issued securities of a company, other than by way of a transfer of securities in the ordinary course of business, is invalid except to the extent-

(a) that the court otherwise directs; or

(b) contemplated in an approved business rescue plan.

(2) During a company's business rescue proceedings, each director of the company-

(a) must continue to exercise the functions of director, subject to the authority of the practitioner;

(b) has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so;

(c) remains bound by the requirements of section 75 concerning personal financial interests of the director or a related person; and

(d) to the extent that the director acts in accordance with paragraphs (b) and (c), is relieved from the duties of a director as set out in section 76, and the liabilities set out in section 77, other than section 77(3)(a), (b) and (c).

(3) During a company's business rescue proceedings, each director of the company must attend to the requests of the practitioner at all times, and provide the practitioner with any information about the company's affairs as may reasonably be required.

(4) If, during a company's business rescue proceedings, the board, or one or more directors of the company, purports to take any action on behalf of the company that requires the approval of the practitioner, that action is void unless approved by the practitioner.

(5) At any time during the business rescue proceedings, the practitioner may apply to a court for an order removing a director from office on the grounds that the director has-

(a) failed to comply with a requirement of this Chapter; or

(b) …" [My emphasis].

[8] In **Neugarten and Others v Standard Bank of South Africa Ltd**, 1989 (1) SA 797 (A) at 808D-809E the Appellate Division held the following,

"As a general rule a contract or agreement which is expressly prohibited by statute is illegal and null and void even when, as here, no declaration of nullity has been added by the statute. (See also the numerous authorities cited after the quoted passage in support of this proposition.) Whether in a particular case a statutory prohibition falls within this general rule depends upon the construction of the enactment concerned. In the instant case, though there is no express declaration of nullity, it is acknowledged all round that in the absence of consent the guarantee is void. It is therefore unnecessary at this stage to refer to the principles and indicia usually invoked to decide this question. (See Swart v Smuts 1971 (1) SA 819 (A) at 829C-830C and Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd 1978 (2) SA 872 (A) at 885E-G.) Since the guarantee at the time it was signed was a nullity, it follows that it 'is not only of no effect, but must be regarded as never having been done.' (Schierhout v Minister of Justice 1926 AD 99 at 109.)

It is well-settled law that there can be no ratification of an agreement which a statutory prohibition has rendered ab initio void in the sense that it is to be regarded as never having been concluded (I shall refer to such as a "void agreement"). In Cape Dairy and General Livestock Auctioneers v Sim 1924 AD 167, cattle were purchased in contravention of Law 28 of 1896 (T) which made it an offence to sell cattle or other livestock on a Sunday.

The sale was held to be an unlawful and invalid transaction. The Court a quo held that "there cannot be ratification of a bargain which is prohibited by statute." - (See at 169 of the Appellate Division report of this case.) On appeal Innes CJ at 170, in reference to this point, confirmed that "ratification relates back to the original transaction, and there can be no ratification of a contract which is prohibited and made illegal by statute". Similarly in Re Townsend, Ex parte Parsons (1886) 16 QBD 532 (CA) at 546 Lindley LJ said that: "If the Act of 1882 makes the instrument void, all the rest follows easily enough. It follows that the parties cannot ratify or confirm a void agreement.'"

[9] I quote the above passage because of its appositeness to the issues in this matter. As rightly observed by Nicholson J in SAI Investments v Van der Schyff NO and Others,3 Neugarten's case concerned the prohibition in section 226(1) of the Companies Act 61 of 1973 against a company providing loan or security for another company controlled by one or more of its directors. This prohibition is not applicable where the security has been given with consent of the members of the company in terms of section 226(2). The Court held that the said consent is required before or at the time the loan is made or security provided and if consent is not given at that stage, the loan or security is invalid. The court held that when consent was required in terms of section 226(1), the lack thereof before or at the time the loan was made

or the security provided was fatal to the validity of the transaction and because one person had not consented at that stage the guarantee was invalid and the appeal should be upheld.

[10] The dictum in Neugarten was applied by Goldblatt J in Simplex (Pty) Ltd v Van der Merwe and Others NNO4 when he concluded,

"[T]o hold that the agreement had a 'latent validity' which could at the option of the respondents be ratified would mean in effect that the agreement was not an agreement of sale but an option given to the respondents. This could never have been the intention of the parties. Either there was an immediate valid and binding agreement of sale or there was no agreement at all. It was never the intention of the parties to have a limping contract which would only become whole on approval by a duly authorised trustee or the Master or the beneficiaries or the Court."

[11] Neugarten was again referred to with approval on Gihwala and Others v Grancy Property Ltd and Others,5 when the SCA had to consider inter alia whether a loan to a director of a company granted without a prior approval could be ratified at a later stage by the members. In following the dictum in Neugarten, the court concluded that Under section 226 of the Companies Act, no. 61 of 1973, an unauthorised loan to a director could not be authorised after it had been made as it was void ab initio and incapable of ex post facto ratification.6

[12] In SAI Investments v Van der Schyff NO and Others,7 Nicholson J had to decide whether an agreement to sell the property by a trustee without the requisite authorisation by the Court or the Master, was capable of being ratified ex post facto. Nicholson J seemed to prefer the approach adopted in Tuckers Land and Development Corporation (Pty) Ltd v Wasserman8 where the court summarised the principles to be applied in deciding whether a contract made in conflict with a statutory provision is null and void as follows:

"1. The validity of a contract in such circumstances depends upon the intention of the Legislature. Generally the consequence of such conflict is nullity of the contract, but that is not an inflexible rule. A careful consideration of the wording of the statute and its objects may lead to the conclusion that the Legislature did not intend invalidity to result.

2. Indiciae that point to an intention that invalidity of the contract should result include the following:

(a) The use of the words "shall" or "moet" in the relevant section.

(b) The fact that the provision is expressed in negative terms.

(c) The provision of a penal sanction for contravention of the relevant provision, but in that case the question remains whether or not the Legislature was satisfied that the criminal punishment was to be sufficient sanction without the contract itself being rendered void.

3. A further consideration is whether or not visiting the contract with nullity will cause more inconvenience or lead to more undesirable results than if the wrongdoer is merely punished criminally."

[13] After applying the criteria above, Nicholson J concluded that the contract concluded by a trustee without the prior consent of the Master or the Court was a nullity. This criteria was also applied by the Appellate Division in Neugarten.9 Applying the same principles to facts at hand, it is necessary to consider the intention of the Legislature from the wording of the statute. Section 137(2) of the Act provides that a company director must continue to exercise the functions of director, subject to the authority of the practitioner. Further to this, a director has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so. [My emphasis].

[14] Two forms of sanctions in case of directors who fail to perform their function under the authority of the Practitioner or his/her express instructions are provided under section 137(4) and 137(5) in that firstly, the Practitioner can approach the court and request the removal of such director. Secondly, the section provides that an action that requires an approval of the Practitioner is void unless it is so approved by him/her. I therefore conclude that it could not have been the intention of the Legislature to allow the directors to run the show without the Practitioner's knowledge, participation or approval with the hope that he/she would ratify their deeds. The seriousness at which the Legislature frowns at directors who refuse and/or neglect to operate under the authority and express instructions of the Practitioner manifests itself in the sanction of their removal and that what they do is void ab initio. I agree with the approach in Neugarten, that an act that is void is incapable of being ratified as it is regarded as having not taken place. The best that could be done by the Practitioner in casu was to start a fresh action as whatever was done without his approval was void and could only be withdrawn.

[15] What is compelling in casu is that about two months after the summons was issued, the Practitioner wrote in an email that the directors had not discussed the litigation with him or sought his approval notwithstanding their obligation to operate under his supervision and express instructions. He even indicated that he instructed his legal representative to inform the Plaintiff's legal representative to withdraw the action. It seems this was not acted upon. To interpret the requirement for the approval by the Practitioner as allowing approval ex post facto negates the prima facie purpose of the legislation in respect of the powers granted to the Practitioners regarding the decisions taken after they have been appointed as such and the companies are already placed under business rescue. That interpretation would also undermine the Practitioners and has the potential to defeat the whole purpose of business rescue proceedings.

[16] For the reasons set out above, I find that the Plaintiff did not have the approval of the Practitioner when issuing the summons against the Defendants. I also find the action by the directors of the Plaintiff in instructing Mr. Schutte to issue summons was void for not having been approved by the Practitioner and that their decision is incapable of being ratified ex post facto. For the reason that the court upholds the special plea on this special plea, the special pleas raised on prescription will not be considered as they have become moot and academic.

[17] In the result, the following order is made.

[17.1] The Defendants' special plea on locus standi is upheld.

[17.1] The Plaintiff's claims are dismissed with costs.

Tayob N.O. and E Januarie N.O. v Shiva Uranium Pty Ltd (in business rescue) and others , Gauteng high court case 62989/2021, date: 18 March 2022

Business rescue practitioners-appointments-resignations-who may appoint- Gauteng High Court confirmed SCA decisions and CC decisions- clarity given-previous appointments by CIPC and court set aside as nullity

Application for removal of business rescue practitioners – Court having discretion either to grant or to refuse an order for removal of a business rescue practitioner, which discretion is exercisable if one or more of the grounds for removal set out in section 139(2) of the Companies Act 71 of 2008 has been established on a balance of probabilities – Factual findings must be made and considered to determine whether a case for removal was established. Knoop NO and another v Gupta (Tayob as Intervening Party) [2021] 1 All SA 726 (SCA)

Business rescue -practitioner appointed by board of company in terms of s 129(3)*(b)* – resignation of practitioner – board's power to appoint substitute under s 139(3) not subject to authority or approval of practitioner. Shiva Uranium (Pty) Limited (In Business Rescue) and Another v Tayob and Others (CCT 305/20) [2021] ZACC 40 (9 November 2021)

END-FOR NOW